IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-472

NICHOLAS BUR,

Petitioner,

-vs-

HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER and DENNIS CHIPMAN,

Respondents.

RESPONDENT DENNIS CHIPMAN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dennis Chipman, one of the respondents herein, respectfully requests that the petition for Writ of Certiorari be denied.

QUESTIONS PRESENTED

Respondent Dennis Chipman disagrees with petitioner's statement of the issues presented and restates those issues relating to said respondent as follows:

1. Whether police officers who have in their possession an arrest warrant which was issued by a Court Commis-

sioner and which is valid on its face may be held liable for damages for:

(a) executing the warrant and disregarding the arguments of innocence and the purported evidence proffered at the scene of the arrest by the party named in the warrant;

(b) seizing and handcuffing the party named in the warrant where no injuries are alleged in the Complaint other than embarrassment.

2. Whether a police officer who did not participate in the arrest described above but who was present at the scene of said arrest which was made by officers from a neighboring city may be held liable for damages for disregarding the arguments of innocence and the purported evidence proffered by the person being arrested and for failing to interfere with the arrest and handcuffing of the person named in the arrest warrant?

STATEMENT OF THE CASE

Respondent Dennis Chipman incorporates the following statement of facts set forth in the June 23, 1976 Memorandum Opinion and Order of the District Court. (A. 9-13):

> "From the pleadings and papers on file in this case, and from the affidavits and documents submitted in support of and in opposition to the motion for summary judgment, the following facts appear: On October 5, 1971, the plaintiff was issued a traffic citation and complaint in the form prescribed by §345.-11, Wis. Stats. The citation and complaint was signed by Officer Carl Karwack, and charged the plaintiff with a violation of §341.04, Wis. Stats. The citation and Complaint further notified the plaintiff that he had to appear in Branch 3 of the Milwaukee County

Court, Room 635, Milwaukee County Courthouse, at 8:30 a.m. on November 30, 1971. The citation and complaint was subsequently sworn to before a Milwaukee County Court Commissioner, Herbert Schultz, on November 11, 1971, and filed with the clerk of court for the Milwaukee County Court on November 24, 1971.

The car the plaintiff was driving when he received the citation was a 1972 Chevrolet purchased 11 days earlier, on September 24, 1971, from the Humphrey Chevrolet Company. It appears that Humphrey Chevrolet undertook to arrange for the mechanics of transferring the title for the 1972 Chevrolet to the plaintiff. As is permissible in Wisconsin, the plaintiff physically transferred his license plates from a 1968 Ford, which was his "Trade-in" for the 1972 Chevrolet, to the latter vehicle. These plates expired at the end of September 1971, but the plaintiff believed that a title certificate was necessary before the registration plates on the 1972 Chevrolet could be renewed. Plaintiff nevertheless thought (and indeed, presently maintains) that operation of the 1972 Chevrolet on and after October 1, 1971, was sanctioned by §341.04(1)(a), Wis. Stats.:

> "A vehicle may be operated by a private person after the date of purchase of such vehicle by such private person * * * if application for registration and certificate of title is made."

The plaintiff asserts that he tried to explain the foregoing facts to Officer Karwack on October 5, 1971, but that Karwack nevertheless issued the citation and complaint. Thereafter, on October 18, 1971, the plaintiff received his title certificate for the 1972 Chevrolet, and mailed the title certificate, application form, and registration fee to the State of Wisconsin.

Plaintiff claims that he did not appear in Milwaukee County Court as directed by the citation and

complaint for two somewhat inconsistent reasons: (1) he had lost his copy of the citation, and (2) he had not yet received his new license plate stickers, and believed that until he had such stickers to display to the county court judge, the traffic citation would not be voided. Upon the plaintiff's failure to appear on November 30, 1971, Judge Louis J. Ceci ordered that a warrant be issued for his arrest. A warrant was subsequently issued, signed by Court Commissioner Herbert Schultz, on February 4, 1972. Although §345.37, Wis. Stats. provides that "[i]f the defendant fails to appear in court at the time fixed in the citation * * * (1) * * * the court may issue a warrant under ch. 968," it does not specify what provision of Chapter 968 is applicable. While §968.09, Wis. Stats. authorizes the issuance of a bench warrant of arrest upon a defendant's failure to appear as required, the warrant of arrest in this case appears to have been based on the substance of the citation previously issued to the plaintiff — i.e., a violation of §341.04, Wis. Stats. on October 5, 1971.

Meanwhile, on January 2, 1972, the plaintiff had received his certificate of registration and license plate stickers. On February 10, 1972, Officer Richard L. Kramer of the Milwaukee Police Department called the plaintiff at his home and informed him that the police department was in possession of a warrant for his arrest. At this point, the affidavits differ as to what next occurred: The plaintiff claims that he tried to explain the situation to Officer Kramer, whereupon Kramer hung up. Kramer, in turn, asserts that he advised the plaintiff that he could appear at either the Traffic Bureau or the Fifth District Police Station of the Milwaukee Police Department, and that failing a voluntary appearance, the warrant would be served upon the plaintiff at his home, at which time he would be taken into custody. Kramer further asserts that the plaintiff then stated that he would not voluntarily appear to answer the warrant. The plaintiff denies that Kramer told him of his option of voluntary appearance, or that he told Kramer he would refuse to so appear.

Thereafter, Officer Kramer forwarded the warrant for the plaintiff's arrest to the Warrant Detail of the Detective Bureau of the Milwaukee Police Department. The following day, February 11, 1972, Detectives Gilbert and Kocher appeared at the plaintiff's place of business, an office building located at 2747 North Mayfair Road, Wauwatosa, Wisconsin. They met the plaintiff in the reception area of the office building, advised him of the existence of the warrant, and placed him under arrest. Once again, the affidavits at this point differ as to what next occurred: The plaintiff maintains that he tried to explain the situation to the defendants, pointing out the certificate of registration in his possession and the then-current registration stickers on his car. When the defendants insisted on following through on the warrant, the plaintiff claims he stated that he would go along voluntarily. As he was putting on his coat, however, the plaintiff maintains that the defendants "grabbed and pulled" him, and then handcuffed him. The defendants, in contrast, claim that they allowed the plaintiff time to get his coat, and that only after a period of time had thereafter expired did they take the plaintiff by the arm to escort him from his office. The defendants assert that the plaintiff then started to struggle with them, whereupon he was placed in handcuffs. One of the attending Wauwatosa officers states that he entered the plaintiff's office after hearing shouting, and observed the plaintiff holding onto a desk and heard him shouting: "I am not going to go!" The plaintiff, in turn, denies holding onto a desk or making any such statement.

After being taken into custody, it appears that the plaintiff was detained for six and one-half hours before being released. Although the complaint states

> that the plaintiff was arrested not only for the registration offense upon which the warrant of arrest was based, but also for resisting or obstructing an officer, it does not appear that anything ever came of this latter charge. The registration offense was subsequently prosecuted, but eventually was dismissed by the district attorney on December 12, 1973."

The District Court Memorandum Opinion and Order from which the above facts are quoted was not concerned with the liability of Wauwatosa patrolman Dennis Chipman who had previously been dismissed from the lawsuit. (See the July 18, 1974 Decision and Order of the District Court dismissing Chipman, (A. 32-36)). Therefore, further clarification of patrolman Chipman's involvement is necessary. Additional facts gleaned from the pleadings and affidavits in support of and in opposition to patrolman Chipman's Motion for Summary Judgment are as follows:

On February 11, 1972, Wauwatosa Patrolmen Chipman and Forster met with Milwaukee detectives Gilbert and Kocher at 2747 North Mayfair Road, Wauwatosa, Wisconsin. The Milwaukee detectives had in their possession an arrest warrant issued against the petitioner, Nicholas Bur, for operating an unregistered or improperly registered motor vehicle. Wauwatosa patrolman Chipman along with the two Milwaukee police detectives entered the reception area of the State Farm Insurance building located at the above mentioned address and the City of Milwaukee detectives had Mr. Bur paged to come to the reception area where the arrest warrant was read to him by one of the Milwaukee detectives. Mr. Bur and the two Mliwaukee detectives then proceeded into the office area while Wauwatosa patrolman Chipman remained in the reception area. A few seconds thereafter Chipman heard shouting in the office area and entered

said area where he observed Mr. Bur holding onto a desk and heard him shout "I am not going to go!" The Milwaukee detectives then handcuffed Mr. Bur and escorted him out of the building to their City of Milwaukee police car and drove him to the Milwaukee jail. Patrolman Chipman did not struggle with, touch or participate in the arrest of the plaintiff.

The other Wauwatosa patrolman, Eugene Forster, did not enter the building but remained in a squad car in the parking lot located at the rear of the building. Patrolman Forster did not struggle with, ouch or participate in the arrest of the plaintiff.

Mr. Bur did not allege in his complaint any personal injuries other than embarrassment.

The District Court summarized the involvement of the Wauwatosa patrolman in its July 18, 1974 Decision:

> "I must also grant the motion for summary judgment of the defendants John Howard, Dennis Chipman, and Eugene Forster. In affidavits submitted by the defendants Chipman and Forster, it appears that although they were present at the time of plaintiff's arrest — Chipman having stayed in the reception area of the plaintiff's office and Forster having stayed in the patrol car — neither one participated in the serving of the arrest warrant (for operating an unregistered or improperly registered vehicle) on the plaintiff, or in the arrest of the plaintiff for either the warrant charge or for obstructing an officer. Plaintiff does not dispute this in his affidavit. There is no genuine issue as to these material facts.

The situation I examine here is one where the two Wauwatosa police officers were acting pursuant to an arrest warrant. They, however, did not participate in the actual arrest as plaintiff was arrested by detectives Kocher and Gilbert of the Milwaukee Po-

lice Department. There is nothing in either plaintiff's complaint or his affidavit to show that Chipman and Forster, or their superior officer, Police Chief Howard, were acting in bad faith, used unreasonable force or violence, or subjected plaintiff to anything more than the indignity of being arrested. I am required as a matter of law to grant the motion for summary judgment of defendants Chipman, Forster and Howard." (A. 34, 35 and 36)

ARGUMENT

The reason set forth by petitioner in support of his request for review on Writ of Certiorari is that the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States.

Respondent Dennis Chipman respectfully submits to the court that none of the issues presented by the arrest of the petitioner, Nicholas Bur, and decided by the District Court and reviewed by the Court of Appeals are questions of first impression in the United States Supreme Court. Each of the issues involving respondent Dennis Chipman are governed by the rule set forth by the Supreme Court in *Pierson vs. Ray,* 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), that it is a defense to an action for damages against police officers under 42 U.S.C. 1983 that the officers acted reasonably and in good faith. The Supreme Court in *Pierson vs. Ray, supra,* stated:

> "We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of good faith and probable cause to an action under §1983 for unconstitutional arrest." 386 U.S. 547 at 551 and 552.

With respect to the issue raised by the police officers' petition, the court stated:

> "The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts §121 (1965); 1 Harper & James, The Law of Torts §3.18, at 277-278 (1956); *Ward vs. Fidelity & Deposit Co. of Maryland,* 179 F.2d 327 (CA8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." 386 U.S. 547 at page 555.

The principle of law which governs the issues raised by the petitioner herein is set forth as follows in *Pierson vs. Ray, supra:*

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983." 386 U.S. 547 at page 557.

The defense of good faith offered by the Milwaukee police detectives and the Wauwatosa patrolman in the case at bar is stronger from a factual standpoint than the defense of the police officers in *Pierson vs. Ray, supra.* In the instant case, unlike the *Pierson* case, the arrest was made pursuant to a warrant issued by a Court Commissioner. The court in *Link vs. Greyhound Corporation,*

288 F.Supp. 898 (E.D. Mich. 1968) held that a sheriff could not be held liable for enforcing an arrest warrant against the plaintiff who subsequently sued for violation of 42 U.S.C. 1983, false arrest and malicious prosecution. The court stated at page 801:

> "As sheriff, Mr. Austin had the duty to take the warrant, whether or not properly issued, and arrest the plaintiff. The situation is quite analogous to that found in *Pierson vs. Ray, supra* . . ."

Further authority for the proposition that a police officer who acts in good faith and in a reasonable manner in executing a warrant issued by a judicial officer is not liable for damages under the Civil Rights Act, 42 U.S.C. §1983, is found in the following decisions: *Commonwealth of Pa. Ex. Rel. Feiling vs. Sincavagl*, 439 Fed.2d 1133 (3rd Cir. 1971); *Quinnette vs. Garland*, 277 F. Supp. 999 (C.D. Cal. 1967); *Anderson vs. Reynolds,* 342 F.Supp. 101 (D. Utah 1972).

It is fundamental under our constitution and laws that an arrestee may not be judged guilty of criminal conduct and punished by his arresting officers. Due process affords the arrestee his day in court. The petitioner's argument is converse to the above proposition in that he not only asks, but demands, that the arresting officers hear his case. Petitioner demands that the arresting officers disregard a warrant issued by a judicial officer for a past offense, based upon his arguments of present compliance with the statutory provision in question. As noted by the District Court in its June 23, 1976 Memorandum Opinion and Order:

> "The Constitution requires that an arrest be supported by probable cause. In the absence of a warrant, the probable cause determination must be made by the arresting officer. But where a warrant does exist, the existence of probable cause has previously been determined by a judicial officer, and the Constitution does not require that that determination be duplicated by the officer executing the warrant. If the person named in the warrant has a defense to the offense charged, that defense can in due course be presented to a judicial official. That the proper place for the arrestee to plead his cause is in court, and not to the officer whom the warrant authorizes and compels to make the arrest." (A. 20)

In further derogation of the petitioner's position is the invalidity of the defense which he offered to the police officers at the scene of the arrest. The Court of Appeals set forth the illogic of Mr. Bur's defense in footnote 2 of its decision:

> "Bur had purchased a new car in September 1971. In October of 1971, the traffic citation was issued for driving an unregistered vehicle. Bur could not register the car until he received his title papers. Under Wisconsin law, plaintiff maintains that a new car may be operated 'if application for registration and certification of title has been made.' Wisc. Stat. §341.04. The fact that Bur's car had been registered subsequent to the citation did not affect the facial validity of the warrant for the previous offense. Production of proof of registration to the arresting officers therefore could not in any way negate the good faith of the arrest." (A. 6)

Further United States Supreme Court authority governing the issues presented by petitioner is found in the decision of *Whiteley vs. Warden, Wyoming State Penitentiary, Wyo.,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), wherein the court stated at 401 U.S. 568:

> "Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the

magistrate the information requisite to support an independent judicial assessment of probable cause."

In the case at bar, neither the arresting Milwaukee police detectives nor the Wauwatosa patrolman who was present during the arrest issued the original citation and complaint. The citation and complaint was issued by Milwaukee police officer Carl Karwack. The citation and complaint was sworn to before a Milwauke County Court Commissioner and a Milwaukee Circuit Court Judge ordered that a warrant be issued for the petitioner's arrest when he did not appear in court as directed by the citation and complaint. Thereafter the warrant in question was issued by a Court Commissioner and sent to the Warrant Detail of the Detective Bureau of the Milwaukee Police Department. (A. 9-12)

The good faith defense set forth in *Pierson vs. Ray, supra,* extends beyond the arrest itself to petitioner's next argument that the use of handcuffs during the arrest amounted to excessive force.

Mr. Bur did not allege any personal injuries other than embarrassment in his complaint. The Court of Appeals dealt with the question of alleged excessive force as follows:

> "As to plaintiff's claim that the arrest was effectuated with excessive force, the district court noted that plaintiff only suffered an abrasion on his wrists from the handcuffs. In his deposition Bur conceded he gave some physical resistance (Dep. 22-23). Even without any resistance by an arrestee, the use of such minimum force is common in the course of an arrest. As the court observed, handcuffing cannot form the basis of a complaint under Section 1983 and, here, where there was admittedly some resistance, this conclusion follows *a fortiori. Taylor vs. McDonald,* 346 F.Supp. 390, 395 (N.D. Tex. 1972). (A. 6 and 7).

The District Court in its June 23, 1976 Decision relied not only on the decisions of other district courts finding no unconstitutional deprivation of civil rights where arrests involved touching and handcuffing, [*Daly vs. Pedersen,* 278 F.Supp. 88 (D. Minn. 1967) and *Taylor vs. McDonald,* 346 F. Supp. 390 (N.D. Tex. 1972)], but also cited the Supreme Court decisions of *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, L.Ed.2d 427 (1973) and *Gustafson vs. Florida,* 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 427 (1973) which held that a full search of the person may be conducted incident to every custodial arrest. (A. 23). The District Court pointed out that a full search of the arrested person is a greater intrusion upon that person than the use of handcuffs.

CONCLUSION

Respondent Dennis Chipman respectfully submits that the issues presented by petitioner and which were decided by the Court of Appeals are governed by principles of law previously enunciated by the Supreme Court of the United States that therefore the petition for Writ of Certiorari should be denied in this case.

Respectfully submitted,

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